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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PETER GUILLARMOD, Defendant and Appellant.	A155009 (San Francisco County Super. Ct. No. SCN229023)

Penal Code section 417, which defines the offense of brandishing a weapon, makes it a misdemeanor to "draw or exhibit[] any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner" other than "in self-defense."[1] (Pen. Code, § 417, subd. (a)(1).) Defendant Peter Guillarmod appeals his misdemeanor brandishing conviction on the sole ground the superior court did not sua sponte instruct the jury on the requirement that the jury reach a unanimous verdict. (See generally *People v. Russo* (2001) 25 Cal.4th 1124, 1132–1133 [discussing the unanimity requirement]; Cal. Const., art. I, § 16.) He contends this was required in order to ensure the jury reached a unanimous verdict as to which of two weapons in his possession was the one he brandished unlawfully. We disagree, and we affirm his judgment of conviction.

[1] The same elements apply to firearms, except the statute prescribes higher punishments. (See *id.*, subds. (a)(2), (b), (c).)

BACKGROUND

The incident from which criminal charges arose was a brief scuffle that took place when the victim was walking down a sidewalk on Ninth Street in San Francisco. According to the victim, the defendant pushed her or bumped into her as she was walking, tried to grab her purse and, after she resisted and ran a few steps away, pulled out what both parties refer to here as a knife sharpener while also holding a chain balled up in his hand, and then lunged at her with the knife sharpener.[2] It's undisputed that the victim's leg touched the defendant when he came into contact with her body; there was a factual conflict as to whether the victim kicked the defendant as this happened or merely used her leg to try to block him.

The only eyewitness was a security guard in a nearby building who, as defense counsel conceded in closing argument, saw only part of the incident (he did not witness the beginning of the encounter). His recollection differed from that of the victim's principally with respect to what the defendant did with the weapons. Although he saw the defendant holding both the chain and the knife sharpener while standing nearby the victim, he didn't observe the defendant jab the knife sharpener toward the victim as she had recalled. He did, though, see the defendant shake the chain at her menacingly and then throw it forcefully on the ground. The eyewitness testified the defendant did this with the chain after the two exchanged some words and the victim spat at him (she denied spitting). Then, the defendant picked up the chain and walked away.

The facts are accurately summarized in greater detail in the appellant's opening brief, and we presume the parties' familiarity with those additional details.

The jury acquitted the defendant of one felony count of attempted burglary but convicted him of a single misdemeanor count of brandishing a deadly weapon. This appeal followed.

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[2] Although the record does not contain the photograph of the knife sharpener that was admitted into evidence, witnesses described the weapon as a "pointy edge[d]," knife-like or sword-like object.

DISCUSSION

Our Supreme Court has summarized the constitutional requirement of a unanimous criminal verdict as follows: "In a criminal case, a jury verdict must be unanimous. [Citations.] . . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' " (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132.)

Here, stressing various discrepancies in the testimony, defendant argues a sua sponte unanimity instruction was required because "either the act of brandishing the knife sharpener or brandishing the chain could have constituted the criminal act of brandishing a deadly weapon . . . and the jurors could well have disagreed with each other about which weapon appellant exhibited and also whether he was justified in exhibiting one of the weapons in self-defense." We disagree.

"[A] unanimity instruction is not required if 'the defendant offered the same defense to both acts constituting the charged crime, so no juror could have believed defendant committed one act but disbelieved that he committed the other, or because "there was no evidence . . . from which the jury could have found defendant was guilty of" the crime based on one act but not the other.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 879 [no unanimity instruction required for robbery charge predicated on multiple items of property allegedly taken].) Some cases reach the same result, i.e., upholding the failure to instruct on unanimity, through a harmless error analysis. (See *People v. Shultz* (1987) 192 Cal.App.3d 535, 539 [discussing the analytical dichotomy].) For example, where the evidence demonstrates beyond a reasonable doubt that a defendant is guilty of the charged offense by means of every act in question, the failure to give a unanimity instruction, assuming one would have been appropriate, is not

prejudicial. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) Regardless of which analytic lens we apply, i.e., that of no error or no prejudice, the failure here to give a unanimity instruction is not reversible.

First, the record shows beyond a reasonable doubt that defendant was guilty of brandishing by means of *both* acts, no matter which witness was believed: by displaying the knife sharpener and by displaying the chain. So " ' "there was no evidence . . . from which the jury could have found defendant was guilty of" the crime based on one act but not the other' " (*Covarrubias*, *supra*, 1 Cal.5th at p. 879) and, alternatively, the failure to instruct on unanimity in these circumstances was not prejudicial (see, e.g., *People v. Stankewitz*, *supra*, 51 Cal.3d at p. 100 [no prejudice resulted from failure to instruct on requirement of unanimity with regard to acts constituting robbery, because of "inescapable" inference that each taking of victim's property was accomplished by force or fear, and "[w]hatever slight differences inhered in the defenses offered by defendant to the takings of the victim's car, watch and money were thus without significance"].)

Although the accounts by the victim and the eyewitness differed in some respects, they both testified consistently (and hence it was undisputed) to facts establishing that the defendant was exhibiting both the chain and the knife sharpener in a "rude" or "angry" manner as the victim and the defendant stood facing each other (see Pen. Code, § 417, subd. (a)(1)). According to the victim, the defendant pulled out the knife sharpener after she felt him touch her purse and told him to "leave me alone" and had run about three steps away from him. She saw him do this when she turned around to look at him. She also testified that when she turned around, "I looked at his face and his expression was . . . angry."[3] She also testified that the defendant had a chain wrapped around his hand, which had been in his hand since the beginning of the encounter, although he didn't "use that against me" or "threaten me with that." Similarly, the eyewitness testified that he saw the defendant standing about three feet away from the victim, holding in one hand

[3] She also testified that he then jabbed the knife sharpener in her direction while uttering something in a threatening tone of voice, which frightened her.

the chain which was making a loud rattling sound (this was the first thing he noticed), and holding the knife sharpener in his other hand, "upwards" at a 90-degree angle "sort of in an aggressive position." He testified that it appeared that the defendant was "harassing" the victim "[b]ecause she looked tense and he had what looked like I guess you'd call weapons in his hand." It was only after that point that their two accounts diverged (as to whether the victim spat at the defendant and whether the defendant lunged with the knife sharpener or, instead, merely shook the chain at her in a threatening way).[4] But regardless of what the jury believed happened next, the offense of brandishing was already complete as to both weapons: the defendant had displayed both weapons in her presence in an angry manner—indeed, in a manner the eyewitness described as "harassing." This was enough to return a conviction as to *both* weapons, under *either* witness's version of events. (See, e.g., *Garfield v. Peoples Finance & Thrift Co. of Riverside* (1937) 24 Cal.App.2d 144, 152–153 (*Garfield*) [displaying weapon at side of defendant's body while angry, without pointing it or threatening to use it, "constituted a violation of every necessary element of the crime"].) Indeed, the jury's verdict confirms that this is what it did. Referencing both weapons (and without any indication in the record of juror confusion), the verdict form states the jury found the defendant "did willfully and unlawfully draw and exhibit a deadly weapon, to wit, KNIFE SHARPENER AND CHAIN, in a rude, angry and threatening manner."

On appeal, the defendant focuses on the possibility jurors might have disagreed as to whether the defendant then jabbed the knife sharpener at the victim or, instead, threw the chain to the ground at the victim. But the argument is premised on a legal mistake. The defendant wrongly assumes the offense requires some kind of hostile, overt gesture with a weapon *in addition to* merely displaying it in a rude or angry manner. But neither the jury instructions nor the law require this. The jury instructions defined the offense in

[4] Although the eyewitness could recall no lunging with the knife sharpener, the defense attorney conceded in closing argument that "what he saw is [not] exactly what happened" because "[h]e clearly missed the beginning" of the encounter.

strict accordance with its statutory definition; the instructions didn't require the jury to find that the defendant gestured with or tried to use either weapon.[5] Gesturing with a weapon is not an element of the crime of brandishing. (See *People v. Booker* (2011) 51 Cal.4th 141, 189 [merely drawing a knife while others fought, without pointing it or participating in the fight, held sufficient; "[a] weapon need not be pointed at the victim to be threatening"].) " 'The thrust of the offence is to deter the public exhibition of weapons in a context of potentially volatile confrontations.' " (*Ibid*.; accord, *People v. Sanders* (1995) 11 Cal.4th 475, 542 ["[t]he weapon need not have been pointed directly at a victim"]; *Garfield*, *supra*, 24 Cal.App.2d at p. 153 ["the pointing of the weapon at the complaining witness is not a necessary element of the offense charged"].)

Second, no unanimity instruction is required " 'when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' " (*People v. Williams* (2013) 56 Cal.4th 630, 682.) So, for example, the Supreme Court in *Williams* rejected a defendant's contention the trial court erred by failing to instruct the jury it must unanimously decide which of two robbery offenses took place during a single homicide incident, a robbery of wallets or an attempted robbery of cocaine. (See *ibid*.) The reason was because, "[d]efendant did not offer a defense based on a showing that he committed either the attempted robbery or the completed robbery, but not both. Rather, his defense was that he was not present at the scene of the crime and therefore played no role whatsoever in any of the crimes committed there. A unanimity instruction therefore was not required." (*Ibid*.)

The same is true here. In closing argument, defense counsel drew no distinction between the two weapons on the brandishing count. Rather, she conceded at the outset of argument "there's a concession that there clearly was a brandishing" and told the jury

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[5] In pertinent part, the jury instructions stated that to prove the defendant is guilty of brandishing a deadly weapon in violation of Penal Code section 417, subdivision (a), the prosecution must prove that "the defendant drew or exhibited a deadly weapon in the presence of someone else, and the defendant did so in a rude, angry, or threatening manner and the defendant did not act in self-defense."

"[t]he only question is whether or not it was done reasonably in self-defense." She didn't specify which weapon was brandished, and she also did not differentiate between the two weapons for purposes of that self-defense theory. She discussed both weapons in the context of the self-defense theory and, in effect, implied it didn't matter which one the jury thought was unlawfully brandished.[6] Although defense counsel did state once in passing that "[h]e didn't lunge at her . . . he didn't try to stab her," that was by no means the thrust of her argument (see footnote 6, *ante*.) In full context, it is clear that defense counsel in closing argument " 'offer[ed] essentially the same defense to each of the acts' " and so there was " 'no reasonable basis for the jury to distinguish between them.' " (*People v. Williams*, 56 Cal.4th at p. 682.)

DISPOSITION

The judgment is affirmed.

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[6] Specifically, according to defense counsel, the encounter began with a collision that was accidental as the defendant was carrying the chain. Then, according to defense counsel, the victim, who was fearful and paranoid and thus prone to misinterpreting events, kicked the defendant and he pulled out the knife sharpener and the two argued, and then she spat at him. The defendant concededly "had a chain in one hand and held the [knife sharpener] in the other." "[W]e don't know what he actually did" next with those objects, she argued, because the two witnesses differed as to whether he shook the chain and whether he lunged at the victim with the knife sharpener. But, she argued, "[h]e did nothing with those items. He didn't attack her" but walked away and "de-escalated the situation." That was the defense theory. And, having conceded "there clearly was a brandishing," defense counsel argued that the defendant "pulled out those items" because the victim kicked him, "and that's why he did that. And then they had a verbal altercation and a misunderstanding on the street." "[H]ere you heard evidence that [the defendant] was kicked and spat at. So he reasonably believed he was in imminent danger of being touched unlawfully," she argued. According to defense counsel, "he did not use any more force than just pointing the thing and that was it and then he left." She argued, "he didn't do anything else [but] just dropped them and walked away or picked them back up—whatever portion you want to accept from that testimony." Later summing up, she concluded: "He's not guilty of brandishing because she kicked him and then spat at him." At no point did she argue that shaking the chain would have been a reasonable use of force even if pointing the knife sharpener was not, or vice versa.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

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